(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expense of any such suit."

Statement.

Two separate actions were commenced in the District Court to recover from defendant Jack T. Campbell doing business as Campbell Construction and Equipment Company, the prime contractor, and two separate sureties on two separate United States Government construction projects.

In March of 1956 the petitioner, by written agreement, leased certain items of equipment to one Anderson-Kerber who was a subcontractor of Jack T. Campbell doing business as Campbell Construction and Equipment Company. This written lease agreement provided that the equipment was furnished for use on a certain United States Government construction project known as Fort Funston and San Bruno Mountain Ridge (hereinafter referred to as Fort Funston) which job was bonded by the Fidelity and Casualty Company of New York.

Between the lessor and the lessee, Anderson-Kerber, it was orally agreed that some of the equipment might be used by the lessee on another separate United States

Government construction project wherein the said defendant Jack T. Campbell doing business as Campbell Construction and Equipment Company was the prime contractor and wherein the defendant Phoenix Assurance Company of New York was the surety. This second United States Government construction contract was located at Travis Air Force Base, California (hereinafter referred to as Travis).

The two separate individual cases were consolidated for purposes of trial and were tried as a single, consolidated action in the United States District Court for the Northern District of California. In the *Fort Funston* case, judgment went in favor of plaintiff for $7,273.33. In the action relating to the Travis Air Force Base, judgment went against plaintiff entirely. This judgment was against plaintiff on the ground that plaintiff had failed to comply with the requirements of the Miller Act, 40 U. S. C. 270(a) through (e) inclusive, and in particular, that plaintiff had failed to give the requisite notice within the time required and in the manner required by said statute.

The total amount prayed for by plaintiff in the two actions was $43,112.65, of which amount $9,434.11 was attributable to the Fort Funston job and $33,678.42 related to the Travis job. By the court's ruling that the notices given were held to be inadequate to constitute compliance with the Miller Act, plaintiff has been deprived of judgment in the amount of $33,678.42. There was no evidence to the contrary relative to the extent of the use of equipment involved or the reasonable value thereof.

REASONS FOR GRANTING THE WRIT.

I.

The Decision of the Court of Appeals in the Case at Bar Is Contrary to the Decision of the United States Supreme Court Interpreting the Notice Requirements of the Miller Act.

Four separate written notices were received by the prime contractor defendant Campbell Construction and Equipment Company, which notices were plaintiff's Exhibit 2, dated September 17, 1956, plaintiff's Exhibit 3 dated November 8, 1956, plaintiff's Exhibit 4, dated January 21, 1957, and plaintiff's Exhibit 5 dated March 8, 1957. The following analysis relates specifically to plaintiff's Exhibit 4 being a letter from the plaintiff's attorneys to the surety on the Fort Funston job with a copy being sent to Campbell Construction and Equipment Company on January 21, 1957 and actually received and dated in the files of Campbell Construction and Equipment Company January 22, 1957, well within the 90 day period.

The leading case construing the notice provisions of the Miller Act is *Fleisher Engineering and Construction Company v. United States for the use and benefit of Hallenbeck (N. Y. 1940), 61 S. Ct. 81; 311 U. S. 15; 85 L. Ed. 12; Certiorari denied, 60 S. Ct. 715; 309 U. S. 677; 84 L. Ed. 1022; Vacated on other grounds, 60 S. Ct. 886; 309 U. S. 693; 84 L. Ed. 1034; Certiorari granted, 60 S. Ct. 886; 309 U. S. 693; 84 L. Ed. 1034.*

This case was reported at the circuit court level as *United States for the use and benefit of Hallenbeck v. Fleisher Engineering and Construction Company, et al.,*

(2 Cir. 1939), 107 Fed. 2d 925, which volume contains a more complete statement of the facts than does the reporting of the case in the decision by the United States Supreme Court. The parallel between the *Fleisher* case and the within case may be seen by the following analysis of the two cases:

United States v. Fleisher, 107 F. 2d 925	*United States v. Campbell,* 293 F. 2d 816 (the within case)
1. The notice consisted of a letter which was sent by ordinary mail. Pages 926, 927.	1. The notice consisted of a letter sent by ordinary mail.
2. The letter was addressed to the project engineer, a copy of the letter was sent to the contractor. Page 926.	2. The letter was addressed to the surety on the Fort Funston job, a copy of the letter was sent to the contractor.
3. A copy of the letter actually reached one of two joint venture contractors. Page 927.	3. Copy of the letter actually reached the prime contractor.
4. The letter notice reached the prime contractor within the 90 day period. Page 926.	4. The letter notice reached the prime contractor within the 90 day period.
5. The notice showed on its face the amount of the claim. Page 927.	5. The notice showed on its face the amount of the claim.

United States v. Fleisher, 107 F. 2d 925	*United States v. Campbell*, 293 F. 2d 816 (the within case)
6. The notice showed on its face that the claimant's contract was with a subcontractor of the prime. Page 926.	6. The notice showed on its face that the claimant's contract was with a subcontractor of the prime.
7. The notice described the items for which a claim was being made. Page 927.	7. The notice described the items for which a claim was being made.

The facts recited above from the text in the Second Circuit Court of Appeals are confirmed in the report of the decision of the United States Supreme Court at *311 U. S. 15, 18.*

Clearly the parallel between the facts in the *Fleisher* case which have received the approval of the United States Supreme Court and the facts in the case at bar is adequately demonstrated with regard to the notice of January 21, 1957. The previous notices which were sent in September and November of 1956 [Pltf. Exs. 2 and 3 respectively] contained substantially the same information and should have been sufficient to put the prime contractor on notice of the claimant's claim.

II.

The Decision of the Court of Appeals in the Case at Bar Is Contrary to the Leading Decision in the Ninth Circuit Court of Appeals Interpreting the Notice Provisions of the Miller Act.

The leading decision in the Ninth Circuit Court of Appeals interpreting the notice provisions of the Miller Act is *Bowden v. The United States for the use and Benefit of Malloy (C. A. Cal. 1956), 239 F. 2d 572; Certiorari denied, 77 S. Ct. 864; 353 U. S. 957; 1 L. Ed. 2d 909.*

The teaching of the *Bowden* case (*supra*), lays down three requirements of the written notice required by the statute (p. 577).

1. That the giving of such a written notice is a condition precedent to the right of suit.

2. That the writing must be sent or presented to the prime contractor by or on the authority of the supplier.

3. That the writing must inform the prime contractor *expressly or by implication* that the supplier is looking to the contractor for the payment of the subcontractor's bill (emphasis added).

In analyzing the notices that were sent in the within case and in particular, plaintiff's Exhibit 4, the letter dated January 21, 1957, the Ninth Circuit Court of Appeals in the within case acknowledges that a copy of the letter was sent to the prime contractor (p. 821) but concluded that this letter did not inform the prime contractor that the appellant is looking to the prime con-

tractor for payment. The specific language of the letter notice of January 21, 1957 with regard to that particular aspect of the notice requirement reads as follows:

> "Will you please advise us immediately of your intentions insofar as payment of this claim is concerned, since if it cannot be promptly paid. we will, of course, institute action under the Miller Act bonds."

This letter notice of January 21, 1957 was within the 90 day period, was addressed to the surety on the Fort Funston job but made internal reference in the letter to both the Fort Funston and Travis jobs, and a copy of the letter was sent to the prime contractor, Campbell Construction and Equipment Company which contractor was the prime contractor on both jobs. Can it be said that the last paragraph of this notice which has been quoted above does not expressly or by implication make demand upon the prime contractor?

It states specifically and expressly that suit on the Miller Act bonds (plural) will be instituted. This is certainly an implication that the claimant is looking to the prime contractor and its sureties. See Appendix for full text of letter.

The third condition set forth in the *Bowden* case (*supra*), namely that the writing must inform the prime contractor that the supplier is looking to the contractor for payment, is a condition *not* spelled out in the statute. (40 U. S. C. 270(b)) and was specifically rejected by the court of appeals of the Tenth Circuit in

McWaters and Bartlett v. United States for the use and benefit of Wilson (10 Cir. 1959), 272 F. 2d 291, 295 where the court stated as follows:

> "It was not essential that a demand be made upon McWaters for payment, although there was enough evidence from which it could be found that Wilson looked to McWaters for payment. The statute does not require a demand for payment. It requires only written notice of the claim. The purpose of the notice to the principal contractor is to enable him to protect himself against his subcontractor by withholding from him money due him on his subcontract."

III.

The Decision of the Court of Appeals in the Case at Bar Is Contrary to Its Own Statement of Law as Pronounced in the Reported Decision in the Within Case.

See: *United States for the use of Carter-Schneider-Nelson v. Campbell, 293 F. 2d 816 (Cal. 1961).* (See Appendix.)

At page 820 the 9th Circuit Court of Appeals stated the rule to be as follows:

> "We hold the correct solution of the problem is one advanced by appellant. It contends that the notice period runs from the time the equipment was last available for use on the project. In the instant case, the parties agreed by stipulation that December 5, 1956 was the last day on which any of the leased equipment was at the Travis jobsite."

It is also equally true that the unrefuted evidence shows that the appellant did not start to retake his equipment until approximately the 14th of December, 1956 [Rep. Tr. pp. 166 and 167]. The equipment was thus clearly available for use until the appellant started to retake it on the 14th or 15th day of December, 1956. Plaintiff's Exhibit 5 represents a registered letter dated March 8, 1957 and received by the prime contractor March 13, 1957 as shown by the return receipt attached to said letter. Thus the registered mail notice [Pltf. Ex. 5] was actually received by the prime contractor on the 89th day after the equipment was available for use on his job. This notice was by the appellate court's own statement adequate as to content (p. 820). Based on the appellate court's statement of the law, that time began to run the last day the equipment was available for use, it is clear that the notice was received within the 90 day period. Thus, the appellate court did not apply the very test which it itself enunciated in the decision in the within case.

IV.

The Decision of the Court of Appeals in the Case at Bar Is Contrary to the Letter and Spirit of the Statute Involved and Unnecessarily and Narrowly Construes That Section Contrary to the United States Supreme Court's Announced Decisions That This Act Is to Be Liberally Construed, Thereby Denying Plaintiff a Substantial Right and Depriving Plaintiff of Recovery of Damages Amounting to $33,678.42.

In *United States for the use and benefit of Hallenbeck v. Fleisher Engineering and Construction Company (supra)*, the Circuit court states that the object of requiring notice to the principal contractor was doubtless to enable him to withhold payments from the subcontractor until the latter should pay his own men who had worked on the job (p. 928). Further, the court stated a statute such as the Miller Act, giving a remedy on a payment bond to laborers and materialmen, is remedial, and under the authority, should be liberally construed. That this is the proper rule of interpretation is evidenced from the decision of the United States Supreme Court affirming the 2nd Circuit Court of Appeals, decision, 311 U. S. 15, 18.

In the within case, with notices in September of 1956 before the job was finished, also in November 1956, January 1957 and March 1957, the prime contractor was well aware that his subcontractor was leaving the claimant unpaid and therefore had adequate notice in plenty of time to withhold payments from his subcontractor, Anderson-Kerber. A fair and liberal construction of the notice statute would properly hold that the prime contractor received adequate and timely notice and the claimant should be permitted to recover.

V.

The Decision of the Court of Appeals in the Fort Funston Action Improperly Applies a Measure of Damages That Is Contrary to Decisions in Other Circuit Courts of Appeal That Have Heretofore Passed on This Precise Point.

Apparently the trial court and the Ninth Circuit Court of Appeals took the actual days use of the equipment on the Fort Funston job and divided these days by thirty in order to reduce them to months and then applied the monthly rate for the computation of the amount to which appellant was entitled. This computation is erroneous in that the actual days use was spread over a larger number of months than the reduction of the claim to months by a mathematical computation would indicate. Accordingly, the judgment of $7,273.33 should in reality be $9,434.11 predicated upon the time the equipment was available for use based upon the monthly rental rates over the entire spread of time the equipment was out of appellant's possession.

See:

United States for the use of Susi v. Zara (2nd Cir. 1944), 146 F. 2d 606, 612.

VI.

The Issues Presented in This Petition Are of Far Reaching Importance and if the Present Decision of the Court of Appeals Is Allowed to Stand, Such a Difference of Ruling Will Be Applied in the Several Circuits as to Contribute to Massive Confusion in This Area of the Law.

To permit the within decision to stand would create confusion, in that this decision in the Ninth Circuit would be contrary to the decision of the United States

Supreme Court and other circuit courts of appeal as indicated below.

(a) UNITED STATES SUPREME COURT AND SECOND CIRCUIT: *Fleisher Engineering and Construction Company v. United States for the use and benefit of Hallenbeck (supra). United States for the use and benefit of Hallenbeck v. Fleisher Engineering and Construction Company, et al. (2 Cir. 1939), 107 F. 2d 925.*

(b) FIFTH CIRCUIT. Oral notice has been held sufficient. *Houston Fidelity and Casualty Company and Joe B. Evans et al. v. United States for the use and benefit of Trane Company (5 Cir. 1954), 217 F. 2d 727. Coffee v. United States for the use and benefit of Gordon (5 Cir. 1946), 152 F. 2d 968.*

(c) EIGHTH CIRCUIT. A letter of *inquiry* to the prime contractor has been held sufficient notice. *United States for the use and benefit of Hopper Brothers Quarries v. Peerless Casualty Company (8th Cir. 1958), 255 F. 2d 137; Certiorari denied 78 S. Ct. 51; 358 U. S. 831; 3 L. Ed. 2, 69.*

(d) NINTH CIRCUIT. *Bowden v. United States for the use and benefit of Malloy (supra).*

This Ninth Circuit decision requires three elements of adequate notice (although one condition is not provided for by statute) but nevertheless, petitioner has met all three conditions.

(e) TENTH CIRCUIT. Oral notice and exhibition to the prime contractor of a writing constitutes adequate notice. *McWaters and Bartlett v. United States of America for the use and benefit of Wilson (10th Cir. 1959), 272 F. 2d 291.*

It is clear that in spite of the United States Supreme Court's rather clear enunciation of the law in the *Hallenbeck* case *(supra) that there continues to be* a difference of ruling in the several circuits and a lack of uniformity which needs once and for all to be put to rest by a decision of the United States Supreme Court in the within matter. Further, the rule enunciated by the Ninth Circuit in the *Bowden* case (*supra*) has not been followed in the within case nor has the very rule enunciated in the within case been followed by the Court in its ultimate decision on this matter. In accordance with the principle that the statute here involved is a remedial statute which should be liberally construed, and in order to insure that the decisions of all circuits are uniform and follow the decision of the United States Supreme Court in the *Hallenbeck* case *(supra)* it is respectfully submitted the within decision of the Ninth Circuit Court of Appeals should be reversed.

Conclusion.

The Petition for Writ of Certiorari should be granted.

Dated December 20, 1961.

Respectfully submitted,

KENNETH E. LEWIS,

Of Counsel:

ANDERSON, MCPHARLIN & CONNERS.

APPENDIX.

Plaintiff's Exhibit 4.

January 21, 1957

801-81E

Fidelity & Casualty Co. of New York
60 Sansome Street,
San Francisco, California

Re: Carter-Schneider-Nelson, Inc.
Campbell Construction and Equipment Co.

Gentlemen:

This firm represents Carter-Schneider-Nelson, Inc., which in March, 1956, rented to Anderson-Kerber Co., Inc., a subcontractor under Campbell Construction and Equipment Co., certain items of construction equipment consisting of a Bros. Pneumatic Compactor, Adams Motor Grader, 3 Caterpillar Diesel Tractors and Dozers and a White Water Wagon for the agreed rental of $6,116.00 per month. This equipment was rented for and used on the Fort Funston and San Bruno Mountain Ridge job, Contract No. DA-04-203 ENG-4275, with some of it being used on the Nike installation job at the Travis Air Force Base. We have been informed by the Corps of Engineers that your company furnished the Miller Act bond on both these jobs as surety for Campbell Construction and Equipment Co.

The above-mentioned equipment was employed on said jobs until December 15, 1956, at which time the equip-

ment was returned to Carter-Schneider-Nelson, Inc., except for one Caterpillar Tractor. There is now due, owing and unpaid to Carter-Schneider-Nelson, Inc. a balance of $45,737.17 as of December 15, 1956, for the rental of this equipment, plus the additional amount that accrued since that time for the rental of the one Caterpillar Tractor, plus the cost of any repairs for damage other than reasonable wear and tear, plus also the interest that has accrued on this indebtedness.

Will you please advise us immediately of your intentions insofar as payment of this claim is concerned, since if it cannot be promptly paid, we will, of course, institute action under the Miller Act bonds.

Yours very truly,

ELDON V. McPHARLIN

EVM:ttm

1-21

cc to Campbell Construction and Equipment Co.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United States of America, ex rel, Carter-Schneider-Nelson, Inc., a corporation, Appellant, v. Jack T. Campbell, doing business as Campbell Construction and Equipment Company, and Fidelity and Casualty Company of New York, a corporation, Appellees.

United States of America, ex rel, Carter-Schneider-Nelson, Inc., a corporation, Appellant, v. Jack T. Campbell, doing business as Campbell Construction and Equipment Company, and Phoenix Assurance Company of New York, a corporation, Appellees. Nos. 17,181 and 17,182. Aug. 17, 1961.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: Barnes, Hamlin and Jertberg, Circuit Judges

Barnes, Circuit Judge:

These are two suits under the Miller Act. Jurisdiction in the trial court was based upon 40 U. S. C. §§270(a) through (d). Jurisdiction in this court rests upon 28 U. S. C. §1291.

Appellant is a lessor of earth moving equipment. In March 1956 it leased such equipment to Anderson-Kerber Co., a subcontractor engaged in work on public works projects at Fort Funston and Travis Air Force Base. The prime contractor on both projects was appellee Campbell Construction and Equipment Company (Campbell). The original lease arrangement contemplated use of the machinery at Fort Funston and

not elsewhere, but a subsequent oral modification, provided that the subcontractor could use the equipment at Travis.

After the subcontractor had been in default on the rent for several months, appellant brought an action, under the Miller Act (40 U. S. C. §§270(a) through (e)), against Campbell, the general contractor, and Fidelity and Casualty Company of New York (Fidelity), the surety on the Fort Funston project. A separate Miller Act action was brought against Campbell and Phoenix Assurance Company of New York (Phoenix), the surety on the Travis project. The two actions were consolidated for trial but were concluded by separate judgments.

Appellant was granted no relief in the action against Phoenix. The court held that appellant had not given timely notice of his claim as required by the Miller Act. In the action against Fidelity, appellant was awarded a judgment in the sum of $7,273.33 for the reasonable value of the machinery used at Fort Funston. Appellant has taken appeals from both judgments.

I—APPEAL OF THE ACTION AGAINST FIDELITY:

A. In this appeal appellant claims that the judgment in its favor was insufficient in amount. Further, appellant claims, the court erred in not awarding it prejudgment interest on the judgment recovered.

Appellant contends that it should receive rental payments for the total period during which the equipment was out of its possession. Appellant notes that it rented the equipment to a single subcontractor working under a single prime contractor. It would not be faced

with its present difficulty, it maintains, were it not for the facts that the equipment was used on two jobs and that the prime contractor chose a different surety for each job.

Appellant does not contend, however, that the surety on the Funston project should be held for the whole amount of rental allegedly due for equipment used on both projects. It admits that such a result would be inequitable. Furthermore such a result would be beyond the contemplation of the Act. 40 U. S. C. §270(b) makes the surety liable only for material supplied in connection with the bonded project.

Appellant does contend, however, that the amount awarded it in connection with the Funston project was inadequate. The court granted a judgment of $7,273.33 against Fidelity; while appellant claims that it is entitled to a judgment of $9,654.11. The court's computation of the unpaid rent is in error, appellant claims, because it is based upon the *actual use* of the equipment at the Funston project; appellant should be compensated, it contends, for the time during which the equipment was *available* for use at Funston, even if it was not actually used all the time. This, however, is a false issue (and the battle of case authority which the parties have engaged in with respect to it is irrelevant), for the court's computations purport to award rent for the time during which the equipment was "located at" Funston (Findings IV and V, especially at pp. 67 and 69 of the Record, Volume I in appeal No. 17181). And it does not appear that "available at" means anything other than "located at," especially when it is noted (as will be seen below) that appellant's computation of the "availability" of particular equipment at various

places corresponds significantly and almost precisely with the court's computation of when the equipment was "located at" those places. We note that appellant has not explicitly attacked the court's findings with respect to the location of the equipment at various relevant times, nor has it alleged that those findings are not supported by substantial evidence.

The disagreement between the court's figure and appellant's can be understood only by comparing their methods of computation. The manner in which appellant finally arrived at its figure of $9,654.11 appears on page 26 of its Opening Brief. There it notes that the total rental for the two items of equipment which were used in part at Funston was $17,766.67. It would then *allocate* to the Funston project a portion of this total rental in accordance with its calculation of the time during which the equipment was available for use at Funston. It determined that the two tractors in question were "available" for use at Funston for a total of two hundred and thirty-two days and at Travis for a total of two hundred and seventy-six days, a grand total of five hundred and eight days. So, appellant apportions to Funston 232/508 of the total rental on the two tractors. Interestingly enough, the court's computation (see Record, Vol. I in appeal No. 17181, p. 67) establishes that the two tractors were located (and therefore available for use) at Travis and Funston for a grand total of five hundred and seven days, the period of availability at Funston being two hundred and fifty days, eighteen days *more* than the period revealed by appellant's calculations. Yet the court arrived at a rental figure substantially lower than that computed by appellant. This is because the court's computation takes

into account the fact that all rent was paid through May 27, 1956. The court limited its award to rent accruing after that date. Thus Tractor No. 1 was located at Funston for only one hundred and seven days after May 27th, and only the rent accruing during this time was allowed. Similarly Tractor No. 2 was located at Funston for only fifty-seven days after May 27th, and the court allowed recovery only for rent accruing during this period. Appellant's computation also takes into account the rent paid prior to May 27th; but it apportions this rent to each of the six items in the proportion which the total rent paid bears to the total rent due. (See Appellant's Opening Brief, p. 25.) The total rent paid, $12,232.00 is approximately twenty-two and sixty-four one hundredths per cent of the total rent due, $54,024.33. For that reason appellant allocated $2,400 of the total rent paid to "Cat. [*i.e.*, Tractor] #2" and a like amount to "Cat. [Tractor] # 3", because this figure is twenty-two and sixty-four one hundredths per cent of the total rent due ($10,600) for each of these items. There is no compelling reason to accept appellant's method of calculation, for not all of the items were used for the same period of time before May 27th, and the items used at Fort Funston were in use before May 27th for a longer time than any other items. (For example, Cat. #3 which was not put in use until April 17, 1956 (see Record, p. 67) receives as much rent-paid credit ($2,400) under appellant's computation as Cat. #2 which was put in service on March 27, 1956.) The court's method of computation is entirely accurate: it permits appellant to recover all rent accruing on those items located at Funston after May 27, 1956. And appellant has received all the pre-May 27th rent accruing on such items.

Appellant's claim for additional compensation has nothing to do with its contention that the court based its findings on the "use" rather than the "availability" of the equipment. Appellant's numerous case citations on this issue are, therefore, not in point.

B. Interest.

The trial court refused to award pre-judgment interest to appellant on its recovery. Appellant claims that this was error, relying on Cal. Civ. Code §3287 which permits the recovery of interest on damages from the time that the right to such damages becomes vested. Such pre-judgment interest is recoverable, however, only if the damages are certain or capable of being made certain by calculation. The court, in the instant case, held that the amount claimed was in dispute and uncertain because plaintiff sought in each complaint, rental in excess of any possible amount that it was entitled to recover. Appellant counters that it had no choice but to claim the full amount of unpaid rent against both sureties for it then had no access to the records of the subcontractor and therefore no basis for allocating the rental charges between the two jobs. Whatever the reason behind appellant's position may be, it is clear, in view of the hot dispute over the proper principle of allocating the rent already paid, that the amount due appellant could not be made certain by mere calculation. The court was correct in refusing interest on the ground that the claim was unliquidated (see James Stewart Co. v. Dennett Robertson Electric, Inc., 9 Cir. ..... F. 2d ..... (decided May 31, 1961, No. 16,974)).

We affirm the judgment of the trial court in the appeal number 17181 arising out of the action against Fidelity.

II—APPEAL IN THE ACTION AGAINST PHOENIX:

The Miller Act provides (40 U. S. C. §270(b)) that a claimant seeking recovery for materials provided to a subcontractor must give written notice to the prime contractor, "within ninety days from the date on which such person . . . supplied the last of the material for which claim is made, stating with substantial accuracy the amount claimed. . . ." The giving of such notice is a condition precedent to a supplier's right to sue on the payment bond. Bowden v. United States, 9 Cir. 1956, 239 F. 2d 572, 577, *cert. denied* 353 U. S. 957. Appellee Phoenix asserted that appellant failed to give the notice required by the Miller Act and that therefore its claim was barred. The trial court agreed.

A. The first problem in this appeal is to determine when the time for giving notice expired. Appellee asserts that the ninety days begins running when the lessor delivers the equipment. Since the last equipment supplied to the Travis job was delivered on May 17, 1956, the last date for giving notice, appellee claims, is August 17, 1956. Appellee's view is based upon an analogy to the furnishing of materials, since the Miller Act itself, does not in so many words deal with the furnishing of equipment. With respect to materials the crucial date to start the notice period is, of course, the date the materials are delivered. So, by analogy appellee arrives at the conclusion that the crucial date for equipment is the date the equipment is delivered.

The lack of merit in appellee's position seems obvious. Delivery of the materials completes the seller's obligation, and full payment becomes due either at once or at a specified time thereafter. Delivery of equipment

under a lease, on the other hand, is only the beginning of the lessor's obligation. He must allow the equipment to remain in the hands of the lessee for such time as is specified by the lease arrangement. Payment is not due at once but at various times during the lease period, usually on a periodic basis. Under appellee's theory, a lessor would, more frequently than not, have to file a Miller Act notice even though the lessee is not in default. If the lease was to run for more than three months, the lessor, in order to protect his rights would have to file a notice after three months, even though the lessee had met every rental payment promptly.

We hold the correct solution of the problem is the one advanced by appellant. It contends that the notice period runs from the time the equipment was last available for use on the project. In the instant case, the parties agreed by stipulation that December 5, 1956, was the last day on which any of the leased equipment was at the Travis job site. Thus the one notice which the court found to be adequate from a content standpoint was not timely. This is Plaintiff's Exhibit No. 5, a letter *dated March 8, 1957,* and mailed to the contractor (Campbell) on March 12, 1957.

The court found, further, that all the other notices which were mailed within the required time were defective in substance. To test the court's determination on this point, we must inquire into the required contents of a Miller Act notice. Both parties cite Bowden v. United States, *supra,* p. 577, to establish the notice requirements. There the court states that the notice must be in writing; must be sent to the prime contractor; and must inform him that the supplier is looking to him for payment. Against these standards, the

court tested the three communications sent by appellant within the period specified in the Miller Act. As the trial court pointed out, Exhibits 2 and 3 (letters dated September 17, 1956, and November 8, 1956) might have been adequate notices under the Funston bond, but they make no reference to the Travis job. They simply fail to make any reference, express or implied, to the oral contract permitting use of the rented equipment on the Travis project. The letter of January 21, 1957 (Exhibit 4) is also inadequate. It specifically mentions the Travis job, but it was sent to the surety on the Funston job. A copy was, it is true, sent to the prime contractor, but it does not inform the prime contractor that appellant is looking to it for payment. Rather, the letter addresses the surety and asks it about its intentions regarding payment of the claim.

It is our opinion that the trial court was correct in rejecting all notices on the ground that no one of them complied with the requirements of the Miller Act.

B. , Appellant asserts that regardless of the propriety of the trial court's conclusion on the notice issue, the court erred in failing to make findings, as required by Rule 52 (Fed. R. Civ. P.), on all disputed issues in the case. The court, in the action against Phoenix, did not make findings as to the time the equipment was available for use at Travis. If the court did err, in failing to make the findings, the error was harmless. Since the court's correct conclusion on the notice issue precludes any recovery by appellant, findings on the "availability" issue would be mere surplusage. Such findings are not needed in order to aid this court in reviewing the decision below, and the absence of such findings is clearly no cause for reversal. If, on the other hand, this court should have determined that the

trial court erred on the notice issue, then we would have been required to send the matter back to the trial court for a determination of appellee's liability. But we have held the court did not err on the issue of notice. The trial court's failure to make findings on all disputed issues is therefore a makeweight which cannot affect the outcome of the case.

C. Since we have accepted the trial court's conclusion on the notice issue, we need not consider the next issue, raised by appellee. We, however, deem it advisable to express our views on this matter.

Appellee, as a precaution, argues that the rental agreement was in fact not a lease but a conditional sale contract covering capital equipment which was not totally consumed on the Miller Act jobs. Thus, appellee contends, the Miller Act bonds do not cover appellant's claim. The basis of appellee's contention is fairly and accurately summarized by the trial court in his opinion in the action against Fidelity (No. 17181), since Fidelity also raised the issue in the trial court. And the trial court's answer to the contention, also contained in the opinion, is clear and convincing, and we here adopt it:

> "Defendants draw attention to the provisions in the agreement under which Anderson-Kerber was to pay $6116.00 per month commencing with March 20, 1956, until and including October 20, 1956, and to the fact that it provided that if payments were so made, Anderson-Kerber would have the privilege of purchasing the equipment at the exact amount of the payments set forth in the agreement. Notwithstanding the fact that the agreement designates the transaction as a rental it

is contended that the agreed payment of the total value of the equipment within seven months compels the conclusion that a sale or conditional sale was involved. . . .

The fact that Anderson-Kerber was given an option to retain the equipment upon payment of the last installment raises some question as to the true meaning of this contract; however, a definitive determination of that issue must take account of all the provisions of the agreement as well as of the intent of the parties to it. . . . The agreement here is entered into for a minimum rental period of one month, expressly provides for monthly payments over a stipulated period of time and for the retaking of the equipment by the lessor without any compensation to the lessee in the event of default. Moreover, evidence was introduced that the type of agreement here involved is often resorted to by lessors of earth moving equipment and is regarded in the trade as the usual leasing agreement. Expert testimony indicated to the court that the total monthly rental set forth was not unreasonable for rental of the type of equipment involved. In view of the language of the contract and the evidence adduced, this court will treat the contract as what it purports to be i.e. a lease."

The trial court's conclusion upon this issue is thus a determination of fact based in large measure upon the trial court's evaluation of expert testimony. Under these circumstances, the trial court's judgment cannot be described as clearly erroneous. To the contrary, the trial court's evaluation of the situation appeals to us as quite sound.

D. One further contention in connection with this issue is raised by appellant. Appellant claims that since appellee did not appeal from the judgment, it cannot now question the trial court's determination that the agreement involved is a lease. This contention is without merit. Generally a non-appealing appellee may raise errors in order to *sustain* the judgment below (see 5 C.J.S. 847), although he may not do so in order to obtain a modification of the trial court's judgment (*Id.* at 843). Thus appellee Fidelity could not have raised the point on appeal (and it did not), but it was perfectly proper for Phoenix to do so.

III—CONCLUSIONS:

In appeal No. 17181, the only questions are the court's refusal to award pre-judgment interest and the proper method of allocating the pre-May 27, 1956, rental which had been paid by Anderson-Kerber. The court's computations properly allocated the rent paid to the period for which it was paid; its refusal to award pre-judgment interest is legally justified under the facts of the case. We *affirm* the judgment in appeal No. 17181.

In appeal No. 17182, the fundamental issue is the adequacy of the Miller Act notices. None of the notices sent by appellant to the prime contractor constitue a timely, unequivocal demand upon such contractor to pay the rental accruing in connection with items used on the Travis project. The district court, therefore, did not err in refusing to award judgment against the surety. We *affirm* the judgment in appeal No. 17182.

(Endorsed) Opinion Filed Aug. 17, 1961.

Frank H. Schmid, Clerk.